UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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IN RE: AUTOMOTIVE PARTS ANTITRUST LITIGATION

IN RE: OCCUPANT SAFETY SYSTEMS

Case No. 12-02311
Case No. 12-00600

Hon. Marianne O. Battani

THIS DOCUMENT RELATES TO:

All Actions

OCCUPANT SAFETY SYSTEMS DISCOVERY PLAN AND CLASS CERTIFICATION SCHEDULE

BEFORE SPECIAL MASTER GENE ESSHAKI
Theodore Levin United States Courthouse
231 West Lafayette Boulevard
Detroit, Michigan
Friday, August 25, 2017

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Detroit, Michigan
Friday, August 25, 2017
at about 10:03 a.m.

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(Special Master and Counsel present.)

SPECIAL MASTER ESSHAKI: Good morning. This is Gene Esshaki. Who is on the line please?

MR. MILLER: Good morning. This is Todd Miller, Your Honor, from Baker & Miller, for Defendant Tokia Rika.

SPECIAL MASTER ESSHAKI: Okay. All right. Before we start, how do you want to address this?

(An off-the-record discussion was held at 10:03 a.m.)

SPECIAL MASTER ESSHAKI: All right. Then we will commence.

MR. MILLER: Your Honor, if I may, I can't hear the others when they speak, and that may be okay because -- well, no, it won't be if they are --

SPECIAL MASTER ESSHAKI: They were not speaking into the microphone so that maybe you will be able to hear them once they speak into the microphone.

Ms. Romanenko, would you please identify yourself for the record?

MS. ROMANENKO: Yes, Your Honor. Victoria Romanenko for automobile dealer plaintiffs.

SPECIAL MASTER ESSHAKI: Can you hear that?

MR. MILLER: Yes, Your Honor, not well, but I can hear it.

SPECIAL MASTER ESSHAKI: All right. Very good. There's not much I can do at this point so --

MR. MILLER: Understood.

SPECIAL MASTER ESSHAKI: This is the matter of In re: Automotive Parts Antitrust Litigation, Master Case 12-md-02311; In re: Occupant Safety Restraint Systems. This matter relates to direct purchaser action, dealership action, end payor action, Case Nos. 2:12-cv-00600, 00601, 00602, 00603. And this concerns the occupant safety restraint systems defendants' discovery program.

We have Ms. Romanenko at the podium ready to address on behalf of the automobile dealer plaintiffs their position with respect to the proposed discovery program.

So, Ms. Romanenko, would you please proceed?

MS. ROMANENKO: Sure. Your Honor, we are here today on a very simple premise. Four years of discovery is enough. It is much more than enough when we are talking about a group of small businesses who neither carried out the conspiracy here nor even interacted with any of the conspirators. Four years is four times the amount allowed for in Judge Battani's practice guidelines which calls for 6 to 12 months of discovery even in complex cases. It's

certainly enough time to have taken all of the discovery defendants could possibly come up with.

And the dealership plaintiffs have produced an enormous amount to the defendants in this case. They have made 68 document productions and five rounds of data productions. They have produced close to a million pages of documents and hundreds of thousands of data points. And these are documents often covering over 15 years of business operations that frequently had to be gathered and copied by hand.

They are documents that contain sensitive customer and business information that took hundreds of hours to review and redact, and on top of all of this, dealership plaintiffs have also given hundreds of hours of depositions which is in addition to everything defendants got from over 100 depositions in deal files in third-party dealer discovery.

So every time any of these discovery events occurred over the course of the last four years, dealership employees have gotten pulled off of their jobs, the dealerships' businesses have been interrupted, they have lost enormous amounts of time and resources running around getting this information for defendant.

Over the course of the last four years my clients have had to answer numerous sets of duplicative discovery

requests, they have had to litigate often duplicative and ultimately unsuccessful motions to compel from the defendants, all of which have taken up hundreds of needless hours of interviews, briefing and hearings.

And so in light of all of this burdensome discovery that the dealerships have already undertaken and all of the time and expense that have accompanied it, I ask the defendants what more do you need? Nothing, they came up with nothing. And I have been asking them that question for months and they have no answer, and that's particularly notable because they had been taking my clients' depositions since July of last year. They know what's happening in this case. They have participated in discovery, they've obviously reviewed the documents and data, and yet they can't come up with anything else that they need.

Typically, by the time depositions are taken, a litigant should know what evidence he has, what he's going to say in his summary judgment and class certification motions, and, of course, what else he needs, if anything. So the only conclusion that we can come to when the defendants have nothing to say on the topic of what else they need is that there is nothing. And that doesn't surprise me, Your Honor, because these defendants said at our very first meet and confer that indirect purchaser discovery was essentially over, and I agree.

Well, now they say, well, even though we haven't identified anything else we need and we haven't been diligent in pursuing dealer discovery, we want an extra year of discovery, and we don't have to identify what else we need that time for.

Well, as Your Honor would anticipate, the courts in this district disagree. For instance, the Court in Sango v. Johnson in the Eastern District of Michigan denied further discovery because, quote, while Sango argues he needs additional discovery in order to properly respond, he does not identify what that discovery might be.

The Court in Dott Acquisition, another Eastern District of Michigan case, denied a request for additional discovery when discovery had been open 16 months, that's less than half the time that dealer discovery has been open here, saying the party asking for more, quote, does not identify with specificity exactly what additional discovery it needs to take, and, quote, there has already been an extraordinarily long discovery period.

That's exactly the situation here. They haven't identified what else they need, so they cannot demand another year of discovery.

And if there was something they really needed, they would have asked for it by now rather than saying that they needed a year to come up with it.

As one judge has said in one of the cases we cited to Your Honor in our brief, my experience has been that when parties don't get what they want in discovery, they seldom let a day pass, let alone two months, and certainly not a year, Your Honor. When they needed something in the past, we heard about it right away. They were requesting and litigating discovery, they were taking depositions, things were going on every day. Now all of that has nearly come to a stop.

As the Court in English v. Cowell said about discovery that comes late in the case like they are proposing, the vast bulk of plaintiffs' discovery requests are either irrelevant, duplicative, or attempts at discovering information previously denied in a prior motion to compel. And this is important, the insistence of a trickle of valid discovery requests does not warrant plaintiffs to continue what has no doubt become an unduly oppressive and burdensome pattern of discovery tactics. That's exactly the same thing we have here. All we can expect from another year of discovery is more unfounded, irrelevant requests that arrive too late in the litigation, more duplicative requests, more duplicative motions to compel that don't gain anything of value for them and cost the dealerships money and time to litigate.

And Judge Battani obviously agrees, otherwise she

wouldn't have stated in her practice guidelines that discovery, even in complex cases, should last no more than 6 to 12 months because she understands, as we all do, as the other judges in this district do, that after discovery gets past a certain point, there is nothing new left to request or litigate.

If there was a legitimate request, it would have been made by now. They have had our discovery plans since April, so even that time period has passed and we haven't gotten anything from them. Any discovery made past that particular point is merely oppressive rather than productive. It is just a tactic, it is no longer a search for truth.

And if we want proof that that's the case, we need to look no further than the AVPR action where the motions to compel were all denied but only after attorneys and plaintiffs spent hundreds of hours on interviews, investigations, briefing and arguing in addition to having to hire an expensive expert. And it is notable that in that case, the major motion made, the one demanding the general ledger production, which we all remember, just sought to relitigate the same issue already decided twice in wire harness, whether incentives were relevant.

Even in AVRP the defendants made what they called their supplemental request a month after the discovery plan was entered. They didn't ask for another whole year as the

OSS defendants are doing here.

So there's no doubt that the dealerships would be unjustifiably burdened by the extension of discovery for yet another year until October of 2018 which would again require hundreds of hours of interviews and research as well as gathering and reviewing sensitive documents and data in addition to lost employee time once again taken from running the business.

The dealerships aren't able to properly organize or store their documents because they could be requested at any time. They have to make every long-term plan around the possibility that they could get hit with another meritless discovery request. This influences every decision about issues ranging from document storage to employee training and hiring to sales.

In addition, dealerships would be burdened in trying to prepare for class certification briefing and could likely be prevented from meeting the deadlines that the Court has set, which, as Your Honor will recall, has been something that Your Honor has said you can't change.

Letting defendants wait until the eve of dealers' class certification motions to start serving more requests is, of course, going to derail the dealers' work on class certification motions and force them to focus on these new requests if they wait until sometime next year, two weeks

before or four weeks before the motions for class certification are due. And what's going to happen is that this is simply going to be allowing pure gamesmanship to undermine the dealers' preparation of their class certificate brief.

As one court said, nor would it be fair to require defendants to respond to further discovery at this late date. The purpose of setting a limit on discovery is to assure both sides an opportunity immediately before trial to engage in ordinary final trial preparation uninterrupted by a flurry of midnight discovery. Allowing further discovery would both frustrate this purpose and the obligation of the court to secure the just, speedy, and inexpensive determination of every action.

So if a litigant has discovery that it's seeking, it needs to ask for it long before the parties are trying to prepare dispositive motions for which that discovery is being sought. And frankly, if they ask for it so close to class certification, they may not even get it in time to use it in class certification briefing. It is just going to be something with no value to outweigh the burden. They can't save it up for a year and drop it on us as we are trying to brief class certification. It is just extremely burdensome and not fair.

All of which is to say, Your Honor, discovery has

to have reasonable limits. As the Supreme Court said, discovery, like all matters of procedure, has ultimate and necessary boundaries. And as another court stated, the discovery rules are not an excursion ticket to an unlimited, never-ending exploration of every conceivable matter that captures an attorney's interest. And, Your Honor, after four years, we've reached those necessary boundaries that the Supreme Court is talking about. We can't just have another year of this.

We have agreed to give the defendants a discovery deadline that's 7.5 months, that's within Judge Battani's range, from the time they first got our discovery plan. That's more than enough time, Your Honor.

Thank you.

SPECIAL MASTER ESSHAKI: Thank you very much.

Anyone else on the plaintiffs' side wish to address this?

(No response.)

SPECIAL MASTER ESSHAKI: Okay. Counsel, would you please approach the -- and identify yourself.

Mr. Miller, can you still hear us?

(A recording from the conference call stated the chairperson has disconnected, the conference will now end.)

SPECIAL MASTER ESSHAKI: Ms. Romanenko, I think you

have insulted him.

MS. ROMANENKO: I thought I put him to sleep.

MR. MARCHAND: Okay. Well, good morning, Your Honor. My name is Sterling Marchand. I'm counsel for the Toyoda Gosei defendants, but I'm also arguing these ADP discovery issues on behalf of Tokai Rika as well.

Your Honor, we actually agree that this issue before the Court is very simple. There is no dispute that defendants are entitled to additional discovery in this case, and there is no dispute that whatever that additional discovery is cannot duplicate what has already come before it in terms of what has been certified on the ADPs.

The only dispute before this Court and for Your Honor to decide is how long is a reasonable window for the OSS defendants to have to conduct that additional discovery. The plaintiffs propose -- the ADPs propose a cutoff that is three months from now while the OSS defendants propose a cutoff 12 months from now. We are not talking about limitless discovery. We are not talking about years and years of additional discovery by the OSS defendants. We are talking about three months versus 12 months.

Your Honor, I want to briefly discuss some of the cases that the ADPs cited because frankly they are all inapposite to the case here. The ADP's counsel cited Sango and In re Dott, both instances where the party seeking

additional discovery did so in the midst of motion for summary judgment. The party was arguing that they needed additional discovery to rebut a motion for summary judgment.

In Sango, immediately following the language that was quoted by ADP's counsel, the court said this is insufficient to rebut a properly supported motion for summary judgment, similarly to In re Dott.

That's not the case here. There is no motion for summary judgment before the Court. We are not seeking to prolong a decision on class certification because we need additional discovery. We are here trying to set the discovery schedule at the outset.

For the same reason, the other cases cited by the ADP counsel don't apply here. They cite cases where the parties sought extra discovery beyond the scheduled cutoff date or the day before the cutoff date. Again, we are here to negotiate the discovery schedule at the outset, not to seek additional time.

Counsel also cited to a case where the party asked for discovery to be open literally indefinitely and, again, we seek 12 months recognizing that there is a cutoff in August of 2018 so that we can all be ready for the class certification motion briefing that is due in October 2018.

Now, what the ADPs are essentially asking this Court to do is to rule today without seeing any actual

additional discovery requests, that no matter how reasonable and relevant those requests may be, they are too burdensome merely because they were served after November 30th. That is neither fair nor appropriate, especially given the fact that the ADPs have failed to articulate a real prejudice or burden that would arise if the OSS defendants are entitled to another nine months.

On the other hand, the burden to the defendants is very real. The plaintiffs' proposal gives us only three months from today to complete supplemental discovery, additional non-expert depositions and other discovery on the ADPs. This cuts off discovery for the ADPs merely 11 months before the start of class certification briefing.

And, Your Honor, I'm not proposing that we save all of our discovery and file it on the eve of the close of fact discovery or on the eve of class certification, but what we are asking for is a reasonable amount of time as discovery proceeds in this case, as our depositions are taken, as other discovery is collected, for us to assess what is needed to defend our case both at class cert and at trial so that we have sufficient facts that we are entitled to in this case.

The plaintiffs' proposal also cuts off discovery of the ADPs while discovery on the other parties is ongoing. So, again, they get the benefit of seeking additional discovery on the defendants while we are not entitled to the

same.

This Court, Your Honor, has already struck the right balance between the defendants' rights to evidence to defend itself and the burden on the ADPs. This Court has instructed us that we cannot issue duplicative discovery and that there be one 30(b)(6) deposition of each ADP across all 40-plus cases. That is the right balance. But adopting the ADP proposal would unfairly tip the scales against the defendants.

The second point I want to make, Your Honor, is that even if you were to adopt the ADPs' proposal of cutting off their discovery in this case in three months, it would have no effect on the burden on the ADPs. They have cited repeatedly a lack of predictability, that not knowing if a discovery request is going to come across their desk results in a burden, but they remain subject to discovery in dozens of later filed cases. So that lack of predictability would exist whether the OSS defendants in this case have the rights to seek it or whether it be a defendant in a later filed case.

Additionally, the mere potential of an additional discovery is not a real burden. Only when actual discovery is filed should this Court consider whether the actual request is burdensome, weighing, as the rules dictate, the needs of the parties against the burden, but there is no

motion to quash additional discovery, there are no additional discovery requests before the ADPs presently.

And the other burdens that they describe lie in what they have done to date in response to prior discoveries, and there is certainly no dispute they have produced many, many pages of documents and that discovery is burdensome in litigation.

What I would point out to Your Honor is that this case, at least in my experience, is unlike any other, and that while Judge Battani's guidelines may dictate 6 to 12 months for typical discovery even in complex cases, we are facing a situation where there are 40-plus cases and the defendants are expected to coordinate certainly and to reduce the burden, but the question is for these OSS defendants who are now negotiating their discovery schedule what is a reasonable time frame.

So the last point I want to make, Your Honor, and I would welcome any questions if you have them, but we as OSS defendants should not be required to identify what we need ahead of time. We certainly haven't identified anything to date. If we had, we would have served it. And what we are asking for is a reasonable amount of time not just to assess all of the materials that the ADPs have produced to date and the depositions that they have been subject to as recently as a week ago, but also to see how this discovery proceeds, and

if in the midst of a defendant -- an OSS defendant deposition a new fact is raised, or as our experts begin to engage on the data in preparation for class certification, if they have questions, we should be entitled to the right to seek the additional discovery. And if it is duplicative or too burdensome, then certainly the ADPs have the right to come back and seek protection from that, but this Court should not rule prematurely that all additional discovery is automatically burdensome.

Thank you.

SPECIAL MASTER ESSHAKI: Thank you, Mr. Marchand.

MS. ROMANENKO: Your Honor, just very quickly?

SPECIAL MASTER ESSHAKI: Yes, please, Ms. Romanenko.

MS. ROMANENKO: It's not the case that there is no dispute that defendants aren't entitled to -- that defendants are entitled to more discovery. It's that in order to try to compromise with them, we offered them a date that was seven and a half months from the time that we started negotiating the discovery plan in order to try to reach an agreement with them, and they were obviously not amenable to it.

We don't think that the defendants are entitled to more discovery after four years of litigation and after they have already stopped basically serving anything new or coming up with anything new or seeking more discovery.

They mention one deposition which took place later because the designee was in the hospital, and that one deposition is completed. So there is nothing else that they have identified that is going on that could possibly produce more discovery requests from them.

Discovery requests can continue to flow while discovery continues to flow because it's possible that that discovery is going to give rise to more requests, but here there is no discovery flowing, there is no discovery that's been flowing. Most of our documents and data were produced in 2014 and 2015. The depositions were taken last year, most of them. So anything that really flows from the discovery that's been produced would have been asked about already.

They say that they want their experts to analyze our documents and data. Well, they have had it for years. There's no reason that their experts shouldn't have analyzed all of that. And they have known for years that in this MDL the dealers and the end payors, they buy cars, they don't buy the parts, we are not litigating parts claims, they know that these cases are coordinated. The Judge said I can allow discovery to start and I am. The Judge said I need this to move with more swiftness. They've known that all of this has been going on, and I'm sure they have had been looking at this. There is no reason to tack on another year to four years in order to prolong this discovery.

They say they are not asking for indefinite discovery, but five years of discovery on indirect purchasers like the dealers is basically indefinite. I haven't seen that length of discovery in any of the cases that we looked at when we were researching this. And, in fact, much shorter periods of discovery in some of the cases that we cited to Your Honor have been deemed to be too long, even less than two years. So four years -- going past four years, the five years that they want, that is far, far too long.

And they keep saying we are only giving them three more months. Well, it is not just three more months. First of all, they knew about this four months ago, so we are offering them seven and a half months from the time that we started negotiating, and they knew that we were going to come in here with this position when we first started negotiating. They could have taken a look at anything else they felt like they needed to look at and come up with any more requests. And, you know, we are still here months later and we don't have one single example from them of what it is that they think they might need in the upcoming year, and the law is you just can't get more time for discovery unless you say what it is that you want it for because courts don't just write a blank check to litigants; there must be some boundaries and some level of predictability. If they had come up with something, that would be different, but they

simply haven't.

And in addition to the fact that they knew about this four months ago, as I said, they have had the four years, and the Judge has spoken to them, she has made clear that this indirect purchaser discovery needs to all happen together. And it would be just disingenuous to think that there are going to be 40 separate discovery periods after the Judge said dealers and end payors buy cars, not parts, and so it is going to be impossible to split things up into 40 discovery periods.

Now, they also say that we haven't identified a burden, but basically what they are saying is they want another year to try to generate discovery that will inevitably, as in the case law that I read to Your Honor earlier, be irrelevant, too late, duplicative. That's just what happens when you are four years into discovery on a bunch of small businesses and you've run out of things to ask for. You know, the only thing you can do is relitigate issues. Like I said, that's what we saw in at least one of the prior cases -- two of the prior cases, the AVRP and bearings.

As far as discovery from other defendants, you know, they could have put in their own statements. They knew -- I'm sure they knew this is going on. The defendants again have been told to coordinate. We haven't heard from

any other defendants. So it may well be that if there are other defendants that we come across, they will agree that there is nothing more to ask for unless they have identified something. So we can't say that it is acceptable to extend discovery for another year for these defendants who haven't identified anything else that they need because maybe some other defendant will also want future discovery. We have no reason to believe that that's the case.

I think that's it.

SPECIAL MASTER ESSHAKI: All right. Ms. Romanenko, thank you so much.

I have had an opportunity to review all of the submissions by counsel, they were superbly prepared, as were the oral arguments that were presented today, and have given this a great deal of thought.

Some of the observations that I have are that there had been an exceptional amount of discovery that has been conducted in this case to date. On the other hand, I must concur with the defendants that having an open discovery period is not in and of itself burdensome. It is discovery that may arise during that discovery period that is or could be burdensome, but that can only be judged on a case-by-case basis as the matters arise.

It may be that during the course of taking the depositions of the occupant safety people an issue does arise

that was not known before that requires some discovery, a document, something, an interrogatory. To foreclose that now in my mind is prejudicial to the OSS defendants. We don't know. There may, in fact, be no discovery whatsoever taken of the auto dealer plaintiffs during the discovery period that is being requested by the OSS defendants. I would imagine if there is, it is going to be extremely limited.

Similarly, in the dozens of cases that will follow the OSS defendants, the potential for additional discovery goes down, will be much more limited, much more laser focused. Judge Battani and I have already ruled that there will not be duplication of discovery in these cases. So if an issue arises in the OSS case that is discrete, that has not been considered before, they need to have the right to explore that issue.

On the other hand, if the OSS defendants want to send out general interrogatories, or additional requests to produce, or try and schedule a general deposition, I'm the first barrier against that occurring and I will not permit that. I believe Judge Battani will absolutely withhold my decision in that regard.

The issue today is not is discovery burdensome -- additional discovery burdensome. The issue is the length of discovery that the OSS defendants should receive. If there is burdensome discovery, we will address it when it arises.

Defendant has stated, and I intend to hold them to this, that there will be reasonable rolling discovery with no last-minute dumps on the plaintiffs in this case; 30 days before the cert motion you are not going to be permitted to do a discovery dump.

This is, in fact, the precedent-setting ruling because there are other defendants that will be coming up and they will also have the potential of having a small, discrete issue arise in their particular case for which they should have discovery, and to not have discovery would be highly prejudicial in my mind and it should not be permitted.

Counsel for OSS defendants have indicated, and I think he's absolutely accurate, there may be no new discovery. He does not know. He cannot predict today. In fact, there may never be another request. On the other hand, there may be one, and I believe that request will be strictly limited, laser focused, designed to catch a small, discrete issue that was not previously known or touched upon in the general discovery in this case. And for that reason, I'm going to accept the proposal of the OSS defendants, adopt their discovery program, and deny the objections that were filed by the automobile dealer plaintiffs in this regard.

Now, counsel, Mr. Marchand, would you please draft an order, would you please include the magic language that it is pursuant to the order appointing Special Master,

appealable to Judge Battani within the time period provided?

I would like to ask anybody at this point while everybody is still in the room, does this transcript need to be sealed?

MS. ROMANENKO: No.

MR. MARCHAND: No.

SPECIAL MASTER ESSHAKI: Sealing has been waived. All right. I thank you all for coming in. I will see you I guess it is the second Tuesday or third Tuesday in September. The weather will be a little different then. Thank you everybody.

MR. MARCHAND: Thank you.

SPECIAL MASTER ESSHAKI: Ms. Romanenko, would you please give my best regards to Mr. Cuneo?

MS. ROMANENKO: I will.

SPECIAL MASTER ESSHAKI: Thank you.

MR. REISS: Your Honor, we have some couple issues for the discovery plan.

SPECIAL MASTER ESSHAKI: Oh, I'm sorry. I'm sorry. Please. I thought we -- I thought this was the only issue. I'm sorry.

MR. REISS: Well, I think you will be happy to hear that we at least with one of the defendants have resolved one of the issues, so hopefully --

SPECIAL MASTER ESSHAKI: Identify yourself.

MR. REISS: Yes. My name is Will Reiss. I represent the end payor plaintiffs. I'm going to be speaking collectively today for the direct purchaser plaintiffs and the automobile dealer plaintiffs.

MR. MARCHAND: I don't mean to interrupt, but I understand that counsel for Tokai Rika did fall off the phone. If you could dial back in, I think he should be able to listen into this portion.

MR. REISS: Let's keep him off -- I'm kidding.

(Telephone conference reconnected at 10:37 a.m.)

SPECIAL MASTER ESSHAKI: Mr. Miller?

MR. MILLER: Yes. I'm very, very sorry.

SPECIAL MASTER ESSHAKI: Well, Ms. Romanenko was taken aback because she thought she insulted you.

MR. MILLER: No, no, not today.

SPECIAL MASTER ESSHAKI: Okay. So obviously in the past. Okay. You're back on.

Mr. Reiss is -- let me just catch you up to date. I have denied the motion by -- the objections by the automobile dealer plaintiffs to the discovery schedule proposed by the OSS defendants.

Now Mr. Reiss is standing at the podium about to make an argument on behalf of all of the plaintiffs, the subject matter which I'm about to learn.

MR. REISS: Great. Yeah, and I will just summarize

the issue. This was actually in our discovery plan, this was issue number --

MR. MILLER: Will, can you somehow move closer? I really cannot hear counsel when they are at the lectern.

SPECIAL MASTER ESSHAKI: You can step forward. We are going to put the telephone by the speaker and see if that helps, Mr. Miller.

Sir, identify yourself, please.

MR. REISS: Sure. Again, my name is Will Reiss.

SPECIAL MASTER ESSHAKI: Mr. Miller, is that better?

MR. MILLER: Much better. Thank you very much.

SPECIAL MASTER ESSHAKI: Please proceed.

MR. REISS: Again, I represent the end payor plaintiffs, and I'm speaking on behalf of all of the plaintiffs, and this is in connection with what we have labelled as dispute number three, it is in Roman numeral Section II, number 2-C. The gravamen of the dispute is the date by which defendants should be required to produce all documents pursuant to the discovery plan.

And as I alluded to earlier, we reached an agreement earlier today with Toyoda Gosei, one of the two remaining defendants, and I would like, if I could, to briefly summarize the terms of that agreement, and if I misstate something, I'm certain my colleague will correct me,

but we reached it kind of at the early morning stages so I will do my best.

But the agreement is that Toyoda Gosei will be obligated to produce documents in tranches. And so the first tranche or the first trigger date would be October 16th of this year, and they would be required to produce all of their central file documents, they would be required to produce all documents from custodians who they have identified as 30(b)(6) witnesses. We have noticed 30(b)(6) depositions of both Toyoda Gosei and Tokai Rika. And they would also be required to produce full custodian productions from five individuals who have been currently noticed in 30(b)(1) depositions. And then in addition, based on our choosing, two additional -- they would produce full documents from two additional custodians, and they would be limited to the 25 custodians that Toyoda Gosei had provided us with about a year ago.

And then there would be a second tranche of document production, and this would be ten additional custodians to be named by plaintiffs and, again, this would be limited to this initial list of custodians that Toyoda Gosei provided us with. And we would have a date by which Toyoda Gosei is committing to produce all of its documents and that would be by January 8th.

And we have also agreed to a deposition schedule of

sorts, and this is the part if I again get confused, please correct me, but my understanding is we would commit to taking our 30(b)(1) -- our 30(b)(6) depositions at some point after November 15th. We would take one 30(b)(1) deposition after November 15th, two 30(b)(1) depositions after December 15th, and then after January 15th it would be fair game for all of our remaining 30(b)(1) depositions.

Did I get everything right?

MR. MARCHAND: Very close. I just want to clarify one thing, which is that in that tranche one we agree to seven custodians.

MR. REISS: Correct.

MR. MARCHAND: Seven custodians from the 25. There was one custodian that has been identified in the 30(b)(1)s that has not been collected yet and so it would be very difficult for us to meet that first date for that one individual, but we have agreed to provide seven custodians from the 25 that have been collected by that date.

MR. REISS: So for the seventh we could perhaps negotiate who the custodian is, and that's fine with us.

MR. MARCHAND: Yes.

MR. REISS: With respect to Tokai Rika, we were disappointed that we were unable to reach an agreement with them, and I will certainly let them speak to their position, but my understanding is they suggested that they were okay in

principle but were not prepared to commit to certain dates, and from our perspective that's troubling. I mean, we spent significant time and resources coming out today to argue to the extent that we have disputes, and it sounds like those disputes haven't been resolved. And with Your Honor's indulgence, I just wanted to explain why we think this is, in fact, a generous deal.

So we served defendants, and in particular Tokai Rika, with document requests back in 2015, so they have had our document requests for well over two years. They have conceded that they identified a list of 35 custodians to us; this is back a year ago in 2016. And all we are asking for here, as you have heard our arrangement with Toyoda Gosei, is to produce a subset of those custodians of our choosing. Again, Tokai Rika has conceded that they have collected documents from these custodians, they've reviewed them, and so they should certainly be ready to produce -- frankly be ready to produce all of them but at a minimum a reasonable subset, which for us reflects a significant compromise. So the prejudice to them from our perspective is non-existent.

And to the extent that there is an argument made they didn't collect these documents or didn't produce these documents, I think that is their own responsibility and their own fault because they knew these custodians, they identified them themselves, and we have been negotiating, we have

engaged in meet and confers.

Now, there is some allusion that Tokai Rika draws in their papers that we somehow dropped the ball. We served document requests back in 2015 and we initially met and conferred and then there was a succession of meet and confers and that we stopped for a short period of time, and I'm not going to deny that. I mean, the Court entered discovery orders and class cert orders in other cases and so we were forced to prioritize those other cases. But the fact of the matter is that we reengaged with Tokai Rika back in May of this year, so we have been negotiating with them for months. And, again, these 35 custodians are custodians that Tokai Rika has already selected and reviewed. So it is not as if we are asking for much more. I think we have proposed some additional custodians but it is not a significant additional number. We don't want to be in a position where we are here today spending the Court's time and resources as well as ours and we don't have a definitive agreement. This works for Toyoda Gosei, it frankly should work for Tokai Rika, and we really don't see any good reason why it wouldn't.

And the last point that I want to make is when you are looking at prejudice, there is really potential prejudice for us. So we have got a class cert deadline of October 17th, and I know that seems like that's a long time away, but the fact of the matter is that these defendants are Japanese

defendants, many of the documents are going to be produced in Japanese, so that requires us to translate the documents, to review the documents, and then get ready to notice depositions and take these depositions.

And there was an argument that was made I think in the papers that this is a relatively small case, there are only two defendants left, but that's not quite accurate. I mean, there are actually five defendants in the case right now. Takata there is a stay because they have declared bankruptcy, but we have two settling defendants, and Tokai Rika and Toyoda Gosei are subject to joint and several liability, which means that we have to take discovery of the settling defendants, and the depositions we take of the non-settling defendants and the documents we receive will inform our depositions and discovery with the settling defendants.

So it is still a quite large and complicated case, and we should be entitled to sufficient discovery so that we can meet our class cert deadlines and responsibilities.

Thank you, Your Honor.

SPECIAL MASTER ESSHAKI: Thank you.

Mr. Miller, would you like to respond?

MR. MILLER: Yes. Thank you, Your Honor. I won't spend a lot of time correcting the very many misrepresentations that were just made to you. There are a

couple of salient points.

Tokai Rika has not indicated at any time that it was not willing to work out an agreement with the plaintiffs in a manner at this point similar to the ones that Toyoda Gosei was suggesting. But if you look at our papers, we were suggesting that we would produce a number of custodians by a certain date, it was by year end, and then finish up our production, you know, after that. So we had actually been the one who had put in our papers a proposal to stagger and prioritize.

The issue here right now -- and I do apologize about spending the Court's time, I do apologize that I'm not there live. The idea originally had been that these discussions just had taken place in the last couple days. Plaintiffs just reached out to us late last night at 7:00 p.m. They have yet to make a concrete proposal about how to make this tranche thing work, and so we were not willing to agree because, Your Honor, that would be buying a pig in a poke.

But the real point here was that -- so I wasn't there because Toyoda Gosei was going to handle the argument. We were going to have counsel present but not someone who was intimately involved in this, so I do apologize. I have a court hearing this afternoon in another state.

But anyway, the real point is that we are happy to

discuss this with plaintiffs. There is some practical realities. We are not similarly situated to Toyoda Gosei. Each of us have our own issues and concerns when it comes to document review. We don't have 25 custodians, Your Honor; we actually have 31. Plaintiff has not just proposed a couple additional; they have actually proposed I believe it's 18 additional custodians.

But if we are just talking about our current scope of discovery, we left a meet and confer with just two open issues essentially, and that was geographic scope and time. And we decided to start because we knew we had an obligation to respond to discovery, so we went ahead and started a year and a half, 18 months ago to proceed to collect our documents and start reviewing them. So we are in the midst of that, and it is just a matter of when can we be done with various custodians. We didn't do it on a -- we haven't been doing our review sort of saying, okay, let's go get Mr. X's or Ms. Y's documents, let's just review those and then move on. It has been sort of a much bigger, you know, mass of documents, if you will, electronically, and we are moving forward, and we will have to adjust that somewhat, and we are not complaining about that, we can, to focus in on whatever custodians that we and plaintiffs may work out in terms of a schedule.

But it just comes down to plaintiffs pull a date

and time out of the air and say, okay, you have to be done by middle of September. We were proceeding the pace with the schedule that we had proposed well over a year ago now, back in June of last year we had made a proposal, the defendants had, to the plaintiffs saying let's have our documents done by January, and so we committed those resources to have that done. And I think, standing here today, I think we would be very close to that. I don't know if we would hit it exactly, there might be a little bit of slippage, but, you know, that's why our proposal was designed to address that potential.

So having said all of this, again, I am sorry we are in front of you today. I don't think that, you know, having just heard from plaintiff at 7:00 last night, having told them that we need to have a more -- we can't just say you can pick any custodians and have them done by X date. We need to know who you need because different custodians have different volume of documents. One of our key custodians here has an incredible number of documents that have to be gone through, and so we suspect that's someone they want early and that would be an impossible task.

So that's really all we are talking about, Your Honor, is just practicalities. If plaintiffs are willing to be flexible and work with us through those practicalities, we are happy to work through with them and develop a tranching

schedule, if not identical to, at least broadly similar to the agreement they have reached with Toyoda Gosei.

SPECIAL MASTER ESSHAKI: Thank you, Mr. Miller.

MR. REISS: May I respond?

SPECIAL MASTER ESSHAKI: Mr. Reiss, please.

MR. REISS: Thank you. So just to be clear, when we came here today originally, and we set this out in our papers, we were prepared to argue that both Toyoda Gosei and Tokai Rika should produce all of its custodial production by the middle of September, and we still believe that's a reasonable position.

Now, we negotiated with Toyoda Gosei and we reached a compromise because we didn't want to burden the Court, and frankly compromises are made and negotiations are made. So I just don't quite understand Mr. Miller's argument that we somehow sandbagged him last night by requesting something that was actually a better deal for him than what our original position is.

And we are not asking him to reinvent the wheel on custodians. We are requesting that we be entitled to select a subset. I mean, we are talking about seven custodians coming up in the next month and a half that are a subset of the custodians that he proposed, that he says he's reviewed and collected. And if he hasn't reviewed and collected those custodians, that frankly I think is his responsibility and we

shouldn't be forced to pay a price for that. These are not new custodians that are subject to some new list and newfangled negotiations. These are custodians that Tokai Rika of its own volition chose to offer over a year ago, and so the prejudice to them is minimal.

In fact, about a year ago, and they say this in their papers, they proposed a discovery plan, it was actually in the context of our negotiations with another defendant, but they proposed a plan, and they in their plan offered to produce all documents by January. So we are not -- that's what we are asking for. We are not asking for anything different. We are just saying give us productions from some of these custodians who you have already collected for and, yes, allow us to chose from the list that you have given us.

So frankly I just don't understand the burden. As I alluded to, the burden for us is quite significant because if we are not able to prioritize important custodians early on in litigation, we could get sandbagged, and this has happened in this litigation before. In the auto bearings case, the direct purchaser plaintiffs were in a situation where just several months before class certification the defendants produced millions of pages of documents and the defendants requested the Court to extend the class certification deadline, and I think we all know very well that Judge Battani is not going to be inclined to do that and

we don't want to be in a position to have to request that. We want a schedule that's going to be reasonable to both parties but that frankly gives us sufficient time to review the documents, to translate the documents, and we think that this offer that we have made to Toyoda Gosei that they have accepted is certainly more than reasonable and should be more than applicable to Tokai Rika.

SPECIAL MASTER ESSHAKI: Stay right there, sir.

MR. REISS: Sure.

SPECIAL MASTER ESSHAKI: Mr. Miller, response?

MR. MILLER: Yes, if I may, just a couple sentences, Your Honor. I think Mr. Reiss -- the big fallacy in his statements are, first, he acts as if we should be done by -- again, we're planning to be done by the middle of September anyway. We are not. We didn't put on those resources. We don't think we should be prejudiced by the fact that we never heard from them about our schedule which is ahead of being completed in January for a year. So the company has spent an enormous amount of money, well over a million -- we are in a million -- well over a million at this point, I don't know the exact number but it may be in the millions, to respond to their discovery, and we are doing it in good faith and are using appropriate due diligence. So that's broad point one.

Broad point two is we do have our custodians

loaded. I don't know why he keeps saying that. We have collected their documents. It is just that, as I explained, we didn't review them in a way that plaintiffs now find convenient. That's not how we have been reviewing it. We have to switch that a little bit, and again, as I said before, we are not complaining about that, we can switch that over.

But there is a practical issue is that if you pick seven custodians, I mean, you could end up asking us to produce 70 percent, I don't know if it is quite that high but it might be close, 65 percent of all of our documents may come from seven custodians only. So if that's who plaintiffs happen to pick, then we've got a problem in that we can't get that done. That's all we have been saying to plaintiff is that we have to be practical here, and we are happy to be flexible and practical and work it out consistent with both of our needs.

We don't think we should -- we should be bearing the cost of their silence while we went ahead and moved forward. We have been collecting and reviewing documents throughout this period, but, again, we haven't done it on a custodial basis. So to the extent that they now say we want Mr. X, we have to go determine is that something that can be reasonably done in that time frame that they have identified. That's all we are saying. We are happy to work with them to

come up with that, but there has to be some recognition that, you know, this isn't -- we don't just wake up tomorrow and all of the documents are reviewed and ready to produced.

SPECIAL MASTER ESSHAKI: Thank you, sir.

Mr. Reiss, how long would it take you identify the seven custodians that you would be asking?

MR REISS: I have my co-counsel here. I think we could come up with a list within the next week.

SPECIAL MASTER ESSHAKI: All right. That's what I wrote down. I'm going to give you one week to identify the custodians that you want to take. Then I want you to confer with Mr. Miller and see if you cannot -- if you can come up with a tranched system similar to the Toyota tranched system that you just put on the record.

And, Mr. Miller, you talk about picking an arbitrary deadline. The problem is that what I'm left with is having to pick an arbitrary deadline. And as a consequence, what I'm going to do is once the custodians have been selected and you have been notified, I'm giving you one more week to come up with a tranched plan in agreement with Mr. Reiss. If you cannot reach that agreement, I'm going to tell you right now I'm going to take the Toyota agreement and extend it by two weeks and that will be the final agreement.

Do you understand, Mr. Miller?

MR. MILLER: I think I do, Your Honor. So, again,

I think our practical problem, if they identify -- again, they want to identify all Japanese custodians. We obviously have a number of custodians who are in the U.S., our salespeople in the U.S., et cetera, and, you know, just because we don't have the same language difficulties with them, we are further along with review of them, we did suggest to them last night that we ought to be balancing that out in terms of number of the custodians they pick.

So as long as -- we are happy to work that out as long as there is flexibility in precisely the -- the precise custodians that they pick. If they want to just insist that we -- you know, that they can just lay down seven custodians and we have to be done with those even by late October, that could be a real problem for us, Your Honor, because that could end up being -- that's almost all of our production.

SPECIAL MASTER ESSHAKI: All right. Well, if that issue arises, then I suggest you bring that back to me and let me know. I have always found Mr. Reiss to be a reasonable man. And I've given both of you a roadmap of how this is to proceed, and it is my hope that you can work that out. If you hit a bump and you hit a hiccup, I would encourage you to negotiate around that and, if necessary, you come back you come back to me.

MR. REISS: Can I ask one point of clarification? I understand we are going to be negotiating --

SPECIAL MASTER ESSHAKI: Seven days you identify the custodians.

MR. REISS: Yes.

SPECIAL MASTER ESSHAKI: Seven days you will have discussions with Mr. Miller about creating the tranched plan, and he will discuss with you if there is any particular custodian that presents a problem for him. And I would like -- if he has identified somebody that presents a particular problem, I would like you to consider moving that person or compromising in some way how you deal with that custodian. But at the end of that second seven-day period, you are to come up with a tranched plan that is acceptable to both sides, and if you do not, then the Toyota tranched plan will be utilized adding two weeks to each tranche in the Toyota plan.

MR. REISS: Okay. And just, again, to be clear, in terms of the ultimate date by which the defendants have committed to produce documents, I don't hear --

SPECIAL MASTER ESSHAKI: In the Toyota plan I believe you said that date was --

MR. REISS: January the 8th.

SPECIAL MASTER ESSHAKI: -- January 8th. Add two weeks.

MR. REISS: Add two weeks. Understood. Okay. Thank you.

SPECIAL MASTER ESSHAKI: Mr. Miller, are we all set sir?

MR. MILLER: Yes, Your Honor.

SPECIAL MASTER ESSHAKI: Any reason to have this record sealed?

MR. REISS: None here.

SPECIAL MASTER ESSHAKI: Is there any reason for an order at this point -- I guess we better prepare an order, submit it to Mr. Reiss so we've got it in writing.

MR. REISS: Okay.

SPECIAL MASTER ESSHAKI: Mr. Miller, we are going to do an order, it will be submitted, we will have it in writing so there a record of this.

Ms. Romanenko is looking to approach the bench again so just hold on Mr. Miller.

MS. ROMANENKO: Your Honor, I was looking back through the deadlines that had been proposed by defendants in light of Your Honor's ruling. What they have proposed -- Your Honor said there wouldn't be any requests served four weeks before class cert. What they have proposed is that fact discovery close --

SPECIAL MASTER ESSHAKI: Wait, Counsel, I don't believe I said that. I think what I said is there is going to be no dump, there is no discovery dump a month before the class cert. If they sent out a single interrogatory a month

before the class cert, I don't consider that to be a document dump. A document dump is where they would say we want another hundred thousand documents or here is a set of 25 interrogatories all at once. That's what -- I did not say there will be no requests for the month preceding the cert hearing, the cert motion.

MS. ROMANENKO: So I think the concern is if we stick with that plan, they -- let's say they propound a couple of interrogatories or requests. We are going to have to research that, talk to almost 40 of our clients and give them a response on the date that we also have to file all of our class cert papers and our expert reports. So these things would be on top of one another and it would be another thing to --

SPECIAL MASTER ESSHAKI: What do you propose?

MS. ROMANENKO: What I would request is to make the date July 7th, 2018, which would allow us not to have to respond to requests on the date that class cert things are due and then to have to meet and confer and get motions to compel while we are trying to brief class cert. And I would ask that we make July 7th, 2018 the date on which we would end fact discovery, receive any additional supplemental requests and have any dealer depositions be completed.

SPECIAL MASTER ESSHAKI: Under the existing schedule, when would that be?

MS. ROMANENKO: Well, under the schedule that the defendants have proposed, fact discovery wouldn't close until two weeks before class cert, and additional requests could be made five weeks before class cert, which means that we would basically be looking at having to answer them right as we are briefing class cert, and depositions wouldn't end until six weeks before class cert. So we are just asking to move it back a few months. It would still be next year, but it wouldn't conflict as much with the class cert briefing. And we think in any event --

SPECIAL MASTER ESSHAKI: So the class cert is October?

MS. ROMANENKO: October 18th.

SPECIAL MASTER ESSHAKI: October 18th of 2018?

MS. ROMANENKO: Yes.

SPECIAL MASTER ESSHAKI: Okay. So what you are asking is under the existing proposal, approximately October 12th -- October 2 -- oh, I guess five weeks prior to that discovery would close, six weeks deps would end, and you are asking to take that from a September time frame to a July time frame?

MS. ROMANENKO: Essentially, yes. We are asking to take the additional requests from a September time frame and the end of depositions from -- they have proposed August 31st to July, the beginning of July.

SPECIAL MASTER ESSHAKI: Sir?

MR. MARCHAND: If I can just have a minute here, Your Honor, to discuss?

SPECIAL MASTER ESSHAKI: Please.

MR. MARCHAND: Thank you.

(An off-the-record discussion was held at 11:07 a.m.)

SPECIAL MASTER ESSHAKI: Mr. Marchand.

MR. MARCHAND: Yes. Thank you, Your Honor. It might be helpful, just so I understand, you are proposing to moving all of the dates back eight weeks?

MS. ROMANENKO: Well, you have three different dates here so --

MR. MARCHAND: Right.

MS. ROMANENKO: -- we are proposing to move all the dates back to July 7th, 2018 so that we would know that we would receive your requests and you would be done with depositions by that date.

MR. MARCHAND: I see. Your Honor, I think you've ruled already and, you know, have recognized that we are entitled to reasonable additional discovery and that the parties will do so in a way that is not duplicative and certainly not in a malicious way of saving all of the discovery to the end and dumping it on the ADPs in an effort to delay, and that's certainly correct.

So I don't -- it is a bit of an awkward position to be negotiating again on this point, I would just point out that, you know, if the deadlines were to change, I think that back to July is too far, and that whatever the deadlines are, they should apply to all of the parties in the case so that the ADPs are not being treated to a separate earlier deadline from the rest of the parties. As Your Honor recognized, you know, certainly in that late stage of discovery, I wouldn't expect a lot to come up, but if something were to come up, we should be entitled to seek it in a reasonable fashion. So I would say that we believe that Your Honor's ruling is the correct one and that these dates are reasonable already and staggered in the appropriate fashion.

SPECIAL MASTER ESSHAKI: All right. Thank you.

Ms. Romanenko does raise a good point that with 45 dealers asking for documents at the same time when she has got to be preparing for the class certification motion could be burdensome, and as a consequence what I'm going to do, again, it simply has to be arbitrary, I'm going to say that all discovery for the OSS defendants must be concluded by August 15.

MS. ROMANENKO: Discovery on auto dealer plaintiffs?

SPECIAL MASTER ESSHAKI: On all plaintiffs.

MS. ROMANENKO: Okay.

SPECIAL MASTER ESSHAKI: The order -- I'm not -- there is going to be no carveout for auto dealer plaintiffs. All plaintiffs are going to be 8/15 on a cutoff.

MR. MARCHAND: Okay.

SPECIAL MASTER ESSHAKI: Again, that will have to be worked into an order, counsel.

MR. MARCHAND: Yes, thank you.

SPECIAL MASTER ESSHAKI: All right. Do we have anything else?

(No response.)

SPECIAL MASTER ESSHAKI: Mr. Miller, are you with us?

MR. MILLER: I am. Thank you, Your Honor.

SPECIAL MASTER ESSHAKI: Do you have anything else, sir?

MR. MILLER: I don't. Thank you.

SPECIAL MASTER ESSHAKI: I wish you luck at your hearing this afternoon, sir.

MR. MILLER: Thank you.

SPECIAL MASTER ESSHAKI: Thank you. Thank you everybody.

MS. ROMANENKO: Thank you, Your Honor.

SPECIAL MASTER ESSHAKI: See you in a few weeks.

(Proceedings concluded at 11:11 a.m.)

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CERTIFICATION

I, Robert L. Smith, Official Court Reporter of the United States District Court, Eastern District of Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing pages comprise a full, true and correct transcript taken in the matter of In re: Automotive Parts Antitrust Litigation, Case No. 12-02311, on Friday, August 25, 2017.

s/Robert L. Smith
Robert L. Smith, RPR, CSR 5098
Federal Official Court Reporter
United States District Court
Eastern District of Michigan

Date: 09/22/2017

Detroit, Michigan